

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

NANCY HATCHER)	
Claimant)	
VS.)	
)	Docket No. 234,012
AMARILLO MESQUITE GRILL)	
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Claimant appeals from an Award entered by Administrative Law Judge Jon L. Frobish on November 24, 1999. The Appeals Board heard oral argument May 3, 2000.

APPEARANCES

Roger A. Riedmiller of Wichita, Kansas, appeared on behalf of claimant. Douglas M. Greenwald of Kansas City, Kansas, appeared on behalf of respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The Administrative Law Judge awarded claimant benefits for 8 percent disability to the body as a whole based on functional impairment and denied claimant's request for a higher work disability. The ALJ denied work disability because he found that claimant was terminated from one job and provided a lower paying job for reasons unrelated to her injury, specifically job performance factors. For this appeal, claimant argues that she acted in good faith, was terminated because of her injury, and is entitled to award for work disability.

Claimant also argues she is entitled to a period of temporary partial disability. As of June 10, 1998, claimant's job was changed and her salary reduced. During this period, claimant was working under temporary work restrictions assigned by the treating physician, Dr. J. Mark Melhorn. The ALJ denied the requested temporary partial disability benefits, again because he found that claimant's job was changed and her pay reduced for reasons unrelated to her injury.

The two issues on appeal are, therefore:

1. What is the nature and extent of claimant's disability?
2. Is claimant entitled to temporary partial disability benefits?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds and concludes the Award should be modified. For the reasons stated below, claimant is awarded benefits for a 23 percent work disability and is awarded temporary partial disability benefits for the period of June 10, 1998 to September 15, 1998.

Findings of Fact

1. Claimant began in respondent's kitchen management training program on February 23, 1998. Her salary was \$38,000 per year. She was to become a kitchen manager and continue at that salary if she successfully completed her training program. The training program was to be a three-month program during which claimant would work 72 hours per week. At the end of the training, claimant was to become a kitchen manager.
2. In April 1998, claimant began to experience numbness and cramping in her hands. She testified she reported the problems in mid-April but does not say specifically who she reported it to. The parties stipulated to a May 6, 1998 date of accident.
3. Adam Matlon was claimant's training manager. He was responsible for oversight of claimant's work on a day-to-day basis. He gave reports to Bobby Bromlow, the area kitchen director. Mitch Hauber was the training supervisor.
4. Adam Matlon, the training manager, prepared weekly reports during March 1998 reflecting an evaluation of claimant's work performance. These reports, Exhibit No. 1 to the Bobby Bromlow deposition, contain comments that suggest claimant is generally improving during this period but many still contain a below-standard rating. The reports for March 2, 9, and 16 contain the below-standard rating. Reports for March 23 and March 25, rate the performance as below standard-meets standards. The reports through March 25 were prepared by Adam Matlon. The last report, dated March 30, is in different handwriting and is not signed. It again rates the performance as below standard. Claimant was informed that it was common for the initial evaluations to reflect a below-standard rating.

After the initial six weeks, the evaluations are done each 90 days. Claimant testified she received all of the reports from Adam Matlon at once on March 23, and she and Adam Matlon signed them all on that same date. She did not know whether the reports were all done by Mr. Matlon on that date, only that she had been given all of them on one day. Mr. Matlon had left employment with respondent before these proceedings began and was not located to testify.

5. On March 30, 1998, Mr. Bromlow, area kitchen director, and Mitch Hauber, training manager, met with claimant. Respondent describes this meeting as a performance evaluation but it appears the meeting had a more specific purpose. Claimant had been asked to provide her opinions and criticism of the training program. She did so in a memorandum dated March 26, 1998. The memorandum contained numerous suggestions and indicated claimant considered the program to be disorganized. At the meeting, she was told, as reflected in Mr. Bromlow's hand-written summary, she had two options. She could either quit or she could learn respondent's way of doing things before she tried to change it.

6. In late April 1998, respondent assigned claimant to work as acting kitchen manager.

7. On May 5, 1998, Mr. Bromlow met again with claimant. This meeting was, at least in part, to discuss that claimant had done poorly on a line check. In this meeting, claimant advised that she did not feel she could perform the job and would not have accepted this position if she had known what the responsibilities were.

8. Mr. Bromlow testified, and the Board finds, claimant first reported the problems to respondent she was having with her hands on May 6, 1998. Claimant had testified she reported the problems in mid-April but she does not say who she reported them to and gives only the general date.

9. Claimant went first on her own to Dr. Schmidt. Respondent then sent her to Dr. Lygrisse and ultimately to Dr. Melhorn for treatment. Dr. Melhorn treated claimant from May 27, 1998 to September 15, 1998. At the time of the first visit, Dr. Melhorn released claimant to return to regular work with recommended task rotation. Dr. Melhorn's notes of June 23, 1998, indicate claimant can return to light accommodated work if it is available and otherwise should be off work. On July 2, 1998, he recommended she limit her work to 8 to 10 hours per day. Dr. Melhorn performed surgery for carpal tunnel syndrome on the right on July 13, 1998, and on the left on July 27, 1998. As of September 15, 1998, Dr. Melhorn restricted claimant to 8 hours per day and 40 hours per week. He restricted her to light-medium work which was to limit lifting to 35 pounds maximum and 20 pounds frequently, and he recommended task rotation.

10. On June 10, 1998, claimant was demoted from the kitchen manager training program to a job as assistant kitchen manager with a salary of \$28,000 per year.

11. Respondent contends the demotion was for performance reasons totally unrelated to claimant's injury. Claimant, on the other hand, contends she was unable to perform the training because of her injury and/or that the demotion was in retaliation for claiming workers compensation benefits.

In the Board's opinion, the record does not support the contention that the demotion was in retaliation for making a workers compensation claim. The Board finds, on the other hand, the injury did interfere with claimant's ability to satisfactorily perform the training. This conclusion is supported not only by claimant's testimony but also indirectly by testimony of Mr. Hauber and Mr. Bromlow.

Mr. Hauber testified there were problems with consistency of the food temperature and that claimant did not handle the grill well. He acknowledges that claimant had some limitation on her ability to perform the specific tasks and would, therefore, have needed to be better at delegating. He did not feel she was strong at delegating. He acknowledged that work in the grill required hand/eye coordination because speed was important. He also testified it was difficult to gain the respect of other employees if you were not good on the grill.

Mr. Bromlow testified claimant did not qualify for work as a kitchen manager due to her performance, conflicts with managers and hourly employees, and her ability to perform each function. He testified claimant was not proficient in the grill or fry areas. According to him, claimant was not great at the window station. He stated she had problems with being fast enough.

12. The Board also finds that claimant's injury and the resulting work restrictions would prevent claimant from performing the regular duties of the kitchen manager job. Dr. Melhorn reviewed task lists prepared by both Mr. James T. Molski and Ms. Karen C. Terrill. The list prepared by Mr. Molski included 21 tasks in work claimant had done as a horticulture worker, as a cook, and as a kitchen manager. Mr. Molski identified seven tasks he believed were outside Dr. Melhorn's restrictions. Dr. Melhorn agreed with part of Mr. Molski's application of the restrictions but noted two tasks from claimant's work as a cook that he, Dr. Melhorn, would not prohibit if done on a rotating basis. Dr. Melhorn testified that claimant could probably do one, but not both, of these tasks. The Board construes Dr. Melhorn's opinion, based on Mr. Molski's list, as an opinion that claimant cannot do 6, or 29 percent, of the 21 total tasks. The tasks Dr. Melhorn believed claimant could not do included one task claimant did in her work as a kitchen manager for respondent. Dr. Melhorn agreed that claimant could not do the inventory required for the kitchen manager job because it required lifting up to 75 pounds.

Dr. Melhorn agreed with Ms. Terrill's application of his restrictions to the task list she prepared. Ms. Terrill had identified 5, or 36 percent of a total of 14 tasks, that claimant would not be able to perform within Dr. Melhorn's restrictions. The eliminated tasks included three tasks claimant performed in her work for respondent. The three tasks from

claimant's job with respondent that claimant cannot now do are prep work, inventory, and restocking.

13. When claimant returned to work following surgery, respondent accommodated claimant's restrictions for the work claimant performed as an assistant kitchen manager.

14. On October 20, 1998, claimant started working for another employer at an annual salary of \$33,000 per year plus fringe benefits. Claimant also received an approximately \$200 bonus while working for the new employer. Claimant testified that the bonus was a quarterly bonus. She was not guaranteed further bonuses and other bonuses might be more or might be less. Although not entirely clear in the record, it appears the \$200 was a net amount and the bonus was approximately \$300.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 1999 Supp. 44-501(a).

2. The Board finds claimant is entitled to a work disability. The Board bases this conclusion on its finding that the work-related injury and resulting restrictions rendered claimant unable to perform the duties as a kitchen manager for respondent.

3. K.S.A. 1999 Supp. 44-510e(a) defines work disability as the average of the wage loss and task loss:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.

4. The Board finds claimant has a 32.5 percent loss of ability to perform tasks. This conclusion gives equal weight to the opinion of Dr. Melhorn based on the task list prepared by Ms. Terrill and the task list prepared by Mr. Molski.

5. The Board finds claimant had a 12 percent wage loss. This percentage loss compares claimant's salary of \$38,000 as a kitchen manager/trainee for respondent with the \$33,000 salary plus a \$300 bonus for her new employer. Converted to average weekly wage, the average weekly wage working for respondent was \$730.77 (\$38,000 divided by 52 weeks) and the average weekly wage working for her new employer is \$640.38 (\$33,300 divided by 52 weeks).

Respondent has urged the Board to use the bonus to arrive at a higher wage in claimant's current employment. According to respondent, the \$300 should be multiplied by four to account for the fact the bonus was a quarterly bonus. The Board has not multiplied the bonus by four for two reasons. First, the evidence indicates the bonus is not guaranteed and may be more or less. Second, K.S.A. 44-511 provides that the weekly value of a bonus or bonuses should be determined by dividing the bonus by the number of weeks worked, not to exceed 52 weeks. Claimant had worked approximately one year for her new employer at the time she testified. She had only recently received her only bonus, the \$300.

6. Claimant has, and is entitled to benefits for, a 22 percent work disability based on a task loss of 32.5 percent and a wage loss of 12 percent. K.S.A. 44-510e.

7. Claimant is entitled to temporary partial disability for the period from June 10, 1998, when she was demoted to assistant kitchen manager, to September 15, 1998, when she left employment with respondent. The Board awards temporary partial disability benefits during this period based on the same reasons the Board believes claimant is entitled to work disability. First, the Board believes the injury and restrictions were one of the reasons claimant was unable to successfully complete the training. Second, the Board concludes the injury and restrictions, restrictions that Dr. Melhorn recommended, made claimant unable to perform the job as kitchen manager.

For the period in question, claimant's salary was changed from \$38,000 to \$28,000 for a change in the average weekly wage from \$730.77 to \$538.46, for a difference of \$192.31. The temporary partial benefit should be $66\frac{2}{3}$ percent of the difference or \$128.21 per week for the 13.86 weeks.¹

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on November 24, 1999, should be, and the same is hereby, modified.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Nancy Hatcher, and against the respondent, Amarillo Mesquite Grill, and its insurance carrier, Liberty Mutual Insurance Company, for an accidental injury which occurred May 6, 1998, and based upon an average weekly wage of \$730.77, for 1.43 weeks of temporary total

¹ Claimant's brief argues for temporary partial benefits beginning May 27, 1998, the date restrictions were first recommended, but at oral argument claimant's counsel acknowledged that the wage did not change until June 10, 1998.

disability compensation at the rate of \$351 per week or \$501.93, followed by 13.86² weeks of temporary partial disability benefits at the rate of \$128.21 per week or \$1,776.99, and then 91.3 weeks at \$351 or \$32,046.30, for 22% permanent partial disability, for a total award of \$34,325.22, all presently due and owing less amounts previously paid.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of June 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Roger A. Riedmiller, Wichita, KS
Douglas M. Greenwald, Kansas City, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director

² For purposes of calculating the weeks of permanent partial disability benefits, this would be converted to its equivalent of 5.06 weeks of temporary total disability. As a result, the temporary total disability weeks would be less than 15 and none would be deducted from 415 weeks before multiplying by the 22 percent permanent partial disability.